Fraud under sub-section (2) of section 43 of the Kedah Land Enactment, must mean actual fraud as described in the judgment of the Privy Council in *Assets Co. Ltd.* v. *Mere Roihi* [7] at page 210 which reads as follows:—

"by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part."

There is no doubt on the facts of the case that the first defendant committed fraud against the plaintiff in transferring the land to the second defendant and I have no hesitation in accepting the finding of the facts by the learned judge that the second defendant knew of the existence of the agreement P.1, and therefore that he knew that the first defendant in transferring the land to him as he did, that the first defendant was defrauding the plaintiff. As the Privy Council has stated in the *Assets* case "Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents." Therefore in this case since it has been proved beyond reasonable doubt that the second defendant knew that the first defendant in transferring the land to him had defrauded the plaintiff, the case for fraud had been sufficiently made against the second defendant.

I would therefore dismiss the appeal with costs.

Ong Hock Thye F.J.: I have had the advantage of reading the judgments of the Lord President and Chief Justice and agree that the appeal be dismissed with costs.

It is sufficient to add that, in my view, there was ample evidence to justify the learned trial judge's finding of fraud. The appellant clearly was an active participant in the fraud of Mohamed Zain and was no less guilty of fraud than the other. But for his participation the fraud could not have been committed. His title, therefore, cannot prevail against the claim of the respondent, by virtue of the provisions of section 43 of the Kedah Land Enactment.

Appeal dismissed.

Solicitors: *Jayadeva, Zahir & Ismi.*

UNITED ENGINEERS (MALAYSIA) LTD. v. LAI PING YOON

[O.C.J. (Gill J.) November 21, 1967]
[K.L. — Civil Suit No. 1003 of 1965]

Hire-purchase — Failure to pay instalments — Right of owner to terminate the hiring and to recover arrears of instalments.

In this case the plaintiffs claimed recovery of five hire rental instalments due under a hire-purchase agreement whereby they let a payloader to the defendant. The facts were that the defendant fell into arrears in the payment of his instalments and as the payloader needed repairs, had sent it to the plaintiffs for repairs. The plaintiffs informed the defendant that unless he paid the instalments due they would resume possession and sell the payloader. The defendant did not pay the instalments within the stipulated time and the plaintiffs sold the payloader and brought this action to recover arrears of the instalments.

Held: (1) the defendant being in arrears of instalments the plaintiffs were entitled to terminate the agreement and in the event of the hiring being so terminated to recover the arrears of rent due up to the date of termination;

(2) the defendant was liable to pay the instalments despite the fact that he was deprived of the use of the machine when it was undergoing repairs as the agreement provided that the hirer shall keep the machine in repair.

[Editorial Note: An appeal was lodged to the Federal Court but later withdrawn.]

Cases referred to:—

(1) *Anglo-American Corporation Ltd.* v. *Goodwood Sawmill Co.* [1966] 1 M.L.J. 263.

(2) *Reliance Car Facilities Ltd.* v. *Roding Motors* [1952] Q.B. 844.

(3) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] 1 K.B. 130.

(4) *Yeoman Credit Ltd.* v. *Apps* [1962] 2 Q.B. 508.

(5) *Charterhouse Credit Co. Ltd.* v. *Tolly* [1963] 2 Q.B. 683.

(6) *Doobay* v. *Mohabeer* [1967] 2 W.L.R. 1395.

(7) *Yeoman Credit Ltd.* v. *Waragowski* [1961] 1 W.L.R. 1124.

(8) *Overstone Ltd.* v. *Shipway* [1962] 1 W.L.R. 117.

(9) *Financings Ltd.* v. *Baldock* [1963] 2 Q.B. 104.

(10) *Lee* v. *Butler* [1893] 2 Q.B. 318.

(11) *Helby* v. *Matthews* [1895] A.C. 471.

(12) *Bridge* v. *Campbell Discount Co. Ltd.* [1962] 1 All E.R. 385.

(13) *Re Robertson, Ex parte Crawcour* (1878), 9 Ch. D. 419.

(14) *McEntire* v. *Cross-Brothers Ltd.* [1895] A.C. 457.

(15) *Transport & General Credit Corpn. Ltd.* v. *Morgan* [1939] 2 All E.R. 17 at p. 28.

(16) *Stockloser* v. *Johnson* [1954] 1 Q.B. 476.

(17) *Kelly* v. *Lombard Banking Co. Ltd.* [1959] 1 W.L.R. 41.

(18) *Brooks* v. *Beirnstein* [1909] 1 K.B. 98.

CIVIL SUIT.

S. B. Menon (Mrs.) for the plaintiffs.

A. Y. L. Lee for the defendant.

Cur. Adv. Vult.

Gill J.: This is an action by the plaintiffs for the recovery of five hire rental instalments amounting to $9,829 alleged to be due to them under a hire-purchase agreement dated 11th November, 1963 whereby they let on hire to the defendant a New Model H.30 'B' Series "International-Hough" Payloader bearing engine No. B 236-H-3600 and registration No. BK 6822. The plaintiffs also claim a sum of $1,164.23 in respect of repairs carried out to the payloader as requested by the defendant, and there is a further claim for $2,348.86 on account of goods sold and delivered to the defendant at his request.

The hire-purchase price of the payloader under the agreement was $41,400 of which a sum of $6,000 was to be paid by the hirer "for the option to purchase" on the execution of the agreement. The balance of the hire-purchase price was to be paid by monthly instalments of $1,967 by way of hire rent, the first of such payments to be made on 11th December, 1963 and each subsequent payment to be made on the 11th day of every succeeding month.

Under clause 3 of the agreement the defendant as hirer was to use the property hired in a skilful and proper manner and to keep it in his own custody and control in good and substantial order and repair. Clause 9 of the agreement provided, *inter alia*, that if the hirer made default in payment of any monthly instalment, it would be lawful for the owners without notice to terminate the hiring and resume possession of the property. Clause 11 of the agreement provided, *inter alia*, that if the hiring was determined under clause 9, such determination of the hiring shall not affect or prejudice any claim the owners may have against the hirer for arrears of hire payments or for damages for breach of the agreement.

There is no dispute between the parties as regards the payments made by the defendant under the agreement. Payments of the initial deposit of $6,000 and the first monthly instalment were made on the agreed dates, but the subsequent monthly instalments were paid in arrears. The defendant paid the thirteenth instalment on 20th March, 1965, when by that date he should have paid sixteen instalments, so that he was then in arrears for three months. The eighteenth and final instalment was due on 11th May, 1965, with the result that by reason of his failure to make any payment after 20th March, 1965 he was in arrears of five instalments as on 18th May, 1965. He has admitted in his statement of defence that he did not pay the hire rent for a period of five months.

The only dispute on the facts is with regard to the date after which the defendant ceased to be in possession of the payloader. This dispute arises in consequence of the payloader having been sent to the plaintiffs for repairs. It is common ground that the payloader was first sent to the plaintiffs for repairs on 10th or 11th March, 1965. The evidence of Mr. McMahon (P.W.1), the service manager of the plaintiff company, is that the payloader came in for repairs on 10th March, 1965 when it had a very badly damaged steering gear. The repairs were effected and the machine was sent out on 15th or 16th March, 1965. The machine came in again for repairs on 30th March, 1965 and it was sent out on 3rd or 4th April, 1965. On 8th April, 1965 an employee of the plaintiffs collected the machine from the defendant's work site and it was sent out after repairs on 14th April, 1965. The machine was lastly brought in for repairs on 18th May, 1965, but the defendant did not take it back after the repairs were completed on 20th May, 1965.

The defendant's story is that the payloader was taken to the plaintiffs' workshop on 11th March, 1965 and that he never had possession of it thereafter. According to him the plaintiffs did not write to him at any time to say that the machine was ready for collection. It is significant, however, that it was stated in his solicitors' letter of 16th June, 1965 to the plaintiffs (P.11) that the machine had to be returned to them on a number of occasions for repairs.

Quite apart from the defendant's solicitors' letter, I am satisfied that Mr. McMahon was telling the truth when he said that the machine came in for repairs on a number of occasions. His evidence is borne out by the job cards which he produced. I therefore reject the defendant's evidence that he had never had possession of the payloader after 11th March, 1965 and I find as a fact that it was after 18th May, 1965 that he ceased to have possession of it.

As regards repossession of the payloader by the plaintiffs under the terms of the hire-purchase agreement by reason of the defendant's default in payment of the monthly instalments, it is incontrovertible that the payloader was in their possession as from 18th May, 1965 when it was last sent in for repairs. It is equally incontrovertible that as on that date the plaintiffs were entitled to resume possession. They were not required to give a formal written notice under the agreement to the defendant in order to terminate the hiring on the ground of non-payment of the hiring instalments, but as I stated in *Anglo-American Corporation Ltd.* v. *Goodwood Sawmill Co.*[1] it was necessary for them to make a declaration, or to do some unequivocal act amounting to a declaration, to the defendant of their intention to terminate the hiring. Had the payloader been in the possession of the defendant at the time, the actual retaking of possession by a representative of the plaintiffs from the defendant would have amounted to an unequivocal act equivalent to a declaration to the defendant that

the hiring was being terminated (*per* Denning L.J. in *Reliance Car Facilities Ltd.* v. *Roding Motors* [2]).

There is no evidence that the plaintiffs had made any declaration of their intention to terminate the agreement prior to their letter to the defendant dated 10th June, 1965 (P.10). This letter was not couched in the form of a notice, but it made abundantly clear to the defendant that unless he paid the arrears of instalments within seven days of the letter the plaintiffs were going to sell the payloader. The letter in fact amounted to a declaration either that the hiring would be deemed to be at an end after seven days from the date thereof, or that the hiring had already been terminated but that the plaintiffs were prepared to delay bringing into effect their right to resell on resumption of possession, thereby giving him the opportunity to repay the arrears of instalments and take back the payloader.

The evidence of Mr. McMahon on the question of repossession is that he carried out some repairs to the payloader on 18th June, 1965 on the instructions of the plaintiff company's acting zone manager and that he was also instructed not to allow the machine to leave the workshop as it was officially repossessed. The evidence of Thambapillai (P.W.2), the office manager in the Heavy Equipment Division of the plaintiff company, that the machine was repossessed on 30th June, 1965 cannot possibly be true because there is ample evidence that the machine was sold and delivered to the new purchaser on 18th or 22nd June, 1965. From the evidence of this new purchaser it seems clear to me that he took possession of the machine on 22nd June, 1965, the date on which he made his second payment so as to make up the initial deposit under the terms of his agreement with the plaintiffs. The plaintiffs' solicitors in their letter dated 23rd June, 1965 said that the hiring was terminated on 17th June, 1965.

It is contended for the defendant that for the purpose of calculating the period of seven days mentioned in the plaintiffs' letter of 10th June, 1965 (P.10), time did not begin to run as from the date of the letter but from the following day. That, of course, is perfectly true, but counting from 11th June the defendant had seven full days until the mid-night of 17th June to pay his arrears of instalments and get back the machine. This he failed to do. He says that he offered to pay on 16th June, 1965. It is true that his solicitors wrote a letter on that day to the plaintiffs, but the plaintiffs did not receive it until 19th June, 1965. Moreover, all that his solicitors said in that letter was that their clients were prepared to pay all arrears if the plaintiffs could return the machine to them in good and workable condition, and there was no money sent with this letter. I do not believe a word of the defendant's story that one or two days after the date of his solicitors' letter to the plaintiffs he went to the plaintiff company with a cheque for the arrears of instalments. It is inconceivable that, having clearly given him time to pay, the plaintiffs would refuse to receive his cheque.

It has been argued on behalf of the defendant that the plaintiffs acted inconsistently with their promise contained in their letter of 10th June, 1965 by selling the payloader to a third party. This argument is based on the authority of *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [3] in which it was held that:—

> "Where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of less value".

In the present case it is clear that the plaintiffs made a promise in their letter which the defendant was entitled to act upon but the truth is that it was not acted on because the defendant failed to pay the arrears of instalments on or before 17th June, 1965. Even if the effect of that letter was that the hiring agreement was to be deemed to come to an end after the period specified in the letter, the hiring in fact had been terminated before the payloader was sold to a third party. I am therefore satisfied that the plaintiffs had validly terminated the hiring agreement and that they in no way committed any breach of agreement.

It is contended for the defendant that he was not liable to pay the five instalments because he was deprived of the use of the payloader during the period for which the instalments were payable. I cannot accept that contention. In the first place, I have already made a finding of fact that the payloader was not in the continuous possession of the plaintiffs after 11th March, 1965. In the second place, even if I were to hold that they were in fact so in possession, the defendant was in arrears of three instalments by that date. Moreover, neither on principle nor on authority is there any substance in the proposition advanced on behalf of the defendant that a hirer is not liable to pay the hire instalments for the period during which the property hired is undergoing repairs, unless of course there is a provision to that effect in the hire-purchase agreement. In the present case it was the responsibility of the defendant to maintain the payloader in good repair. I therefore have no hesitation in rejecting this wholly novel proposition of law.

It is maintained on behalf of the defendant on the authority of *Yeoman Credit Ltd.* v.

Apps [4] and *Charterhouse Credit Co. Ltd.* v. *Tolly* [5] that the plaintiffs were in breach of the implied term of any hire-purchase agreement that the goods hired are fit and suitable for the purpose for which they are expressly hired. In the former case the property hired was a secondhand 1954 Ford motor car. When it was delivered to the defendant, by reason of an accumulation of unapparent defects, it was in an unusable, unroadworthy and unsafe condition and required an expenditure of between £70 and £120 to put it into a reasonable condition. It was held that, since the accumulation of defects was such as to destroy the workable character of the car there was a breach of a fundamental condition of the agreement, namely, to provide a functioning car which could be used on the roads. In the second case the subject matter of the hire-purchase agreement was a secondhand Vauxhall car. After taking delivery of the car, the hirer found that it had a defective back axle, defective tyres and other less serious defects which made it unroadworthy and unsafe to drive. It was held that the defects in the car were a breach by the finance company of the term implied at common law to supply a roadworthy car, and since a defective back axle would be an extremely serious matter, being the last thing which the hirer would contemplate on taking the car and requiring a substantial outlay on repair, it constituted a fundamental breach of contract.

I do not see how by any stretch of imagination those two cases can be held to be relevant to the present case. There is no evidence in the present case that the payloader was unusable, unroadworthy and unsafe or that it had any other defects when it was delivered to the defendant under the hire-purchase agreement. There was no undertaking by the plaintiffs to keep the payloader in repair throughout the period of hiring. Nor can there be any implied term of a hire-purchase agreement that the owner shall keep the property in repair, particularly when the agreement itself provides that the hirer shall keep it in repair.

On the question of an undertaking to keep the property hired in repair, I was referred to the case of *Doobay* v. *Mohabeer.*[6] In that case the rice mill, which was the subject matter of the hire-purchase agreement, was not in working order. The owner undertook to have it put in order by two experts coming from Japan but they never came. In the circumstances that case also has no bearing on the present case, as no question of damages arises here, as in that case, on the basis of a failure by the owner to comply with his obligation to put the property in working order. It is true, of course, that where the agreement expressly imposes on the hirer the duty to repair, this obligation does not commence until the owner has fulfilled the implied condition as to fitness by rendering the goods reasonably fit for the purpose for which they are supplied before he effects delivery; and that if the owner fails to fulfil his obligation the cost of repairs rendered necessary after delivery in consequence of his failure is payable by him and not by the hirer (see *Goode's* Hire-Purchase Law and Practice, page 89). In the present case the payloader required no repairs before it was delivered. There were in fact no complaints about it until March 1965. By then the defendant had made use of it for 16 months, and admittedly it had been handled during that period by more than 300 inexperienced hands.

It is lastly argued on behalf of the defendant that the plaintiffs' claim for arrears of instalments amounts to a claim for damages and that they must therefore give the defendant credit for the amount for which they sold the payloader. The short answer to this argument is that a claim for damages for breach of a hire-purchase agreement and a claim for arrears of instalments due and payable thereunder are two distinct and separate claims, as will be clear from the authorities to which I shall come in a moment. Needless to say, an owner can claim damages for breach in addition to arrears of instalments only if he has suffered any damage. In relying on the last sentence in paragraph 615 at page 266 of *Guest* on the Law of Hire-Purchase (1966) in support of his argument, counsel for the defendant appears to have completely overlooked the fact that the learned author was there speaking of the owner recovering possession of the goods in consequence of the hirer's repudiation of the agreement and claiming damages for breach of contract. In the present case the plaintiffs' claim is for arrears of rental instalments and not for damages for breach of the hire-purchase agreement.

In *Yeoman Credit Ltd.* v. *Waragowski* [7] the hire-purchase price of a Ford Van under the agreement was £434 7s. 0d., the terms being an initial payment of £72 and 36 monthly instalments of £10 0s. 9d. with a further £1 to be paid on exercising the option to purchase. The hirer, having paid the deposit of £72 and taken delivery of the Ford Van, repudiated the contract of hire-purchase by his failure to pay instalments for six months. The owners terminated the agreement, retook possession of the van and then sold it for £205. A clause in the agreement provided that, if it should be terminated by the hirer or the owners, the hirer would pay to the owners damages for any breach (if any) and either (a) a fixed sum as agreed compensation for depreciation of the goods or at the option of the owners (b) the arrears of instalments due at the time of repossession. The owners elected to proceed under the second of these two alternatives. They therefore claimed the arrears of instalments unpaid and damages for breach of contract. It was argued on behalf of the hirer

that the owners had failed to show any damage at all, and that their claim to damages was misconceived as it was really a claim for damages for the non-payment of money, the rental in arrears. The Court of Appeal rejected this argument and held that the owners' claim for damages was a proper one in respect of the loss sustained as a result of the hirer's failure to carry through the hire-purchase agreement to its conclusion. It was further held that the plaintiff's claim was not one for damages for depreciation of the vehicle but for damages for breach of contract. The owner was therefore entitled to recover, not only the instalments already due, but also by way of damages the difference between £434 7s. 0d. (less the £1 on the option to purchase) and the sum total of the sale price of the van (£205), the deposit of £72 and the arrears of instalments (£60 4s. 6d.), which worked out at £96 2s. 6d.

In *Overstone Ltd.* v. *Shipway* [8] a hirer, having paid the initial deposit and taken delivery of the goods, paid none of the instalments of hire. The owners terminated the agreement and retook possession of the goods. They then brought an action in the county court for four monthly instalments due at the time of repossession, and recovered judgment. Shortly afterwards, having sold the goods, they brought a second action in the county court claiming damages for breach of contract. The Court of Appeal (Wilmer L.J. dissenting) held that they were not estopped, either at common law or under section 69 of the County Courts Act, 1959, from bringing this second action for breach, as the two causes of action were distinct and separate.

In *Financings Ltd.* v. *Baldock* [9] the hirer,, having paid £100 on the signing of a hire-purchase agreement in respect of a Bedford truck, failed to pay the first two instalments. The owners terminated the agreement and retook possession of the truck under clause 8 of the agreement. Clause 11 of the agreement provided that should the hiring be terminated by the owner under clause 8,

> "The hirer shall . . . . forthwith pay to the owner either (a) such further sum as with the total amount of any instalments previously paid hereunder will equal two-thirds of the total hiring cost shown in the schedule as agreed compensation for the depreciation of the goods or (b) the amount of all instalments and other moneys then already due hereunder, whichever is the greater."

On an action by the owners for damages it was held that the failure of the hirer to pay the two instalments did not amount to a repudiation by him of the hire purchase agreement, that clause 11 was unenforceable, being a penalty clause, and that therefore the owners, who had retaken the vehicle, could recover damages only for breach up to the date of termination and not thereafter. Accordingly, the owners were held entitled only to two instalments in arrears amounting to £56 1s. 4d. with interest at 10% up to the date of judgment. The cases of *Yeoman Credit Ltd.* v. *Waragowski* [7] and *Overstone Ltd.* v. *Shipway* [8] were distinguished on the ground that they were cases of repudiation by the hirer as opposed to termination by the owner, although Lord Denning added (at page 113) :—

> "As a matter of principle, I should have thought that the damages should be the same in either case, whoever terminated the hiring."

Perhaps it will be useful at this stage to discuss the development and nature of hire-purchase transactions. As *Cheshire and Fifoot* on the Law of Contract (6th edition) says at page 179, hire-purchase agreements had their origin in the desire on the part of manufacturers and traders to reach potential customers who could not afford at once to pay the price of their goods. Suppliers began to make contracts under which the price was payable by instalments and the possession of the goods passed at once to the customer, but they retained ownership until the last instalment had been paid. By this means they hoped to protect themselves even if the customer, before completing payment, improperly sold the goods to an honest buyer. But by section 9 of the Factors Act, 1889, substantially reproduced in section 25(2) of the Sale of Goods Act, 1893, a person who has agreed to buy goods and who has obtained possession of them with the seller's consent may, by delivering them to a *bona fide* purchaser or pledgee, pass a good title. A case in point is the case of *Lee* v. *Butler* [10] in which one W. E. Hardy on May 5, 1892 let furniture on a "hire and purchase agreement" to Helen Caroline Lloyd who was to pay £1 on May 6 and the balance of £96 4s. on August 1st, 1892. The furniture was to become Mrs. Lloyd's property only when the final payment was made. Hardy duly assigned the agreement and all his interests thereunder to the plaintiff. Before the condition of the agreement was satisfied Mrs. Lloyd sold and delivered the furniture to the defendant in whose possession it was when the action was brought. The Court of Appeal held that on the proper construction of the agreement Mrs. Lloyd was under an obligation to pay all the instalments and that she had therefore "agreed to buy the furniture". She had accordingly passed a good title to the defendant who could not be sued by the plaintiff.

In *Helby* v. *Matthews* [11] the owner of a piano agreed to let it on hire to one Brewster. The hirer was to pay the rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire. The agreement also provided that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such full payment the piano should continue to be the sole

property of the owner. The hirer received the piano, paid a few of the instalments and pledged it with a pawnbroker as security for an advance. In an action by the owner against the pawnbroker for conversion of the piano the pawnbroker contended that Brewster had "agreed to buy" the piano and so passed a good title under section 9 of the Factors Act, 1889. This contention was upheld by the Court of Appeal, but the decision of that court was reversed by the House of Lords. The decision of the House of Lords was that upon the true construction of the agreement the hirer was under no obligation to buy but had an option either to return the piano or to become its owner by payment in full, that by putting it out of his power to return the piano he had not become bound to buy, that he had therefore not "agreed to buy the goods" within the meaning of section 9 of the Factors Act, and that the owner was entitled to recover the piano from the pawnbroker. *Lee* v. *Butler* [10] was distinguished on the ground that:—

"There was there an agreement to buy. The purchase-money was to be paid in two instalments, but as soon as the agreement was entered into there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment" (*per* Lord Herschell L.C. at page 478).

Helby v. *Matthews* [11] is the leading case on hire-purchase agreements and the hire-purchase agreement which the House of Lords had to consider in that case has been the basis of all hire-purchase agreements ever since. In *Bridge* v. *Campbell Discount Co., Ltd.*[12] at page 398 Lord Denning said:—

"When hire-purchase transactions were first validated by this House in 1895 in *Helby* v. *Matthews*,[11] the contract of hire had most of the features of an ordinary hiring. In particular, the hirer was at liberty to terminate the hiring at any time without paying any penalty. He could return the goods and not be liable to make any further payments beyond the monthly sum then due. There was no clog on his right to terminate. And this was one of the reasons why the House saw nothing wrong with the transaction."

Speaking of the nature of a hire-purchase transaction, his Lordship earlier in his judgment on the same page said:—

"It is in effect, though not in law, a mortgage of goods. Just as a man who buys land may raise part of the price by a mortgage of it, so, also, a man who buys goods may raise part of the price by hire-purchase of them. And just as the old mortgage of land was not what it appeared to be, so, also, the modern hire-purchase of goods is not what it seems to be. One might well say of a hire-purchase transaction what MAITLAND said of a mortgage deed: 'That is the worst of our mortgage deed . . . it is one long *suppressio veri and suggestio falsi*': see his LECTURES ON EQUITY (2nd Edn.) (1949), p. 182. Take this present transaction. If you were able to strip off the legal trappings in which it has been dressed and see it in its native simplicity, you would discover that the appellant agreed to buy a car from a dealer for £405 but he could only find £105 towards it. So he borrowed the other £300 from a finance house and got them to pay it to the dealer, and he gave the finance house a charge on the car as security for repayment. But if you tried to express the transaction in those simple terms, you would soon fall into troubles of all sorts under the Bills of Sale Acts, the Sale of Goods Act, and the Moneylenders Acts. In order to avoid these legal obstacles, the finance house has to discard the role of a lender of money on security and it has to become an owner of goods who lets them out on hire: see *Re Robertson, Ex p. Crawcour*,[13] *McEntire* v. *Cross-Brothers, Ltd.*[14] So it buys the goods from the dealer and lets them out on hire to the appellant. The appellant has to discard the role of a man who has agreed to buy goods, and he has to become a man who takes them on hire with only an option to purchase: see *Helby* v. *Matthews*.[11] And when these new roles have been assumed, the finance house is not a moneylender but a hire-purchase company free of the trammels of the Moneylenders Acts: see *Transport & General Credit Corpn., Ltd.* v. *Morgan*.[15] So you arrive at the modern hire-purchase transaction whereby (i) the dealer sells the goods to a finance house for cash; and (ii) the finance house lets them out on hire to a hirer in return for rentals which are so calculated as to ensure that the finance house is eventually repaid the cash with interest; and (iii) when the finance house is repaid, the hirer has the option of purchasing the car for a nominal sum. The dealer is the intermediary who arranges it all. The finance house supplies him with the printed forms, and he gets them signed. In the result, the finance house buys a car it has never seen, and lets it to a hirer it has never met, and the dealer seemingly drops out."

A contract where the property passes at once but the price is payable by instalments is clearly a credit sale. A hire-purchase agreement is more than a simple contract of hire, for it confers upon the hirer an option to purchase the goods. Thus a bailment coupled with an option to buy, as in *Helby* v. *Matthews*,[11] is clearly a hire-purchase agreement. By granting the option, the owner makes an irrevocable offer to sell the goods to the hirer if the conditions laid down in the agreement are fulfilled. On his part, however, the hirer is under no obligation to buy the goods. He may exercise the option, that is to say, he may accept the offer once he has fulfilled the conditions, if he so wishes, but he may also elect to terminate the hiring and return the goods to the owner without buying the goods. He has a power to accept the offer, but is not bound to do so. The importance of the option to purchase lies in the fact that the hirer is unable to pass a good title to a third party, because he is not a person who has bought or agreed to buy the goods. Since the property in the goods remains in the owner who lets them on hire, the retention of the ownership of the goods and the inability of the hirer (except in special circumstances) to pass a good title provide the owner with some measure of security in case the hirer defaults. The hirer, on the other hand, obtains the benefit of a credit transaction in that he receives the possession and use of the goods in advance of the payment of the price, and is enabled to purchase the goods once the price has been paid. (See *Guest* on the Law of Hire-Purchase, pages 10 and 11, paragraphs 23 and 25).

It is clear from the authorities that at common law upon the termination of a hire-

purchase agreement the owner is normally entitled to retain any sums already paid by the hirer under the agreement. The agreement may provide that upon a breach by the hirer the owner shall be entitled to retain all payments made by the hirer under the agreement, or it may provide, as has been done by clause 11 of the agreement in the present case, that the hirer shall not be entitled to repayment of the money paid on the signing of the agreement or any other sum so paid by him to the owner under the terms of the agreement. This is ordinarily a reasonable provision, since the hirer has had the use of the goods during the period for which he has been paying hire-rent.

It is possible that the court has power in equity to order the owner to return part of the payments made by the hirer if the circumstances are such that it would be unconscionable to allow the owner to retain the payments in full, as, for example, where the hirer has made a larger initial payment and the agreement is terminated by the owner for some comparatively minor breach. In *Stockloser* v. *Johnson,*[16] a case on a repudiated contract of sale, Somervell L.J. and Denning L.J. were firmly of the opinion that the court possessed this power. On the other hand, Romer L.J. felt equally clear that, since the parties had made their own bargain and no question of a penalty in the proper sense of the term arose, the court could not interfere. In the case itself it was held as a matter of fact that there was nothing unconscionable in the defendant retaining the payments made to him, so that the point did not have to be decided. In view of the divergence of opinion among the members of the Court of Appeal in their *obiter dicta* the matter cannot be regarded as settled.

It is equally clear that the sums which may be retained by the owner under a hire-purchase agreement fall into two categories: (i) the initial payment made by the hirer on or before signing the agreement and (ii) instalments of hire-rent paid by the hirer. Some of the hire-purchase agreements, as I have stated above, expressly provide for the retention by the owner of these sums, but even where there is no such provision the hirer will normally have no claim that they should be returned to him.

In modern hire-purchase agreements the initial payment is frequently expressed to be made "in consideration of the option to purchase hereby granted". It might be thought that, if the agreement was prematurely determined, the hirer would in consequence be prevented from ever exercising the option, so that a payment made in respect of it would be recoverable as money paid on a consideration which had totally failed. But this was not the view taken by the Court of Appeal in *Kelly* v. *Lombard Banking Co. Ltd.*[17] where a hirer claimed the return of a sum of money paid in consideration of the grant of an option to purchase. The hire-purchase agreement was determined by the owner in consequence of execution being levied on the hirer's effects. The Court of Appeal dismissed the hirer's claim. "The option to purchase," said Lord Denning (at page 44),

> ". . . is an existing right as from the moment of signing the contract and the payment of the money. So he (the hirer) has got what he has paid for. He has to fulfil the conditions in order to exercise the option. But he has paid for an option which he has got."

The owner is likewise entitled to retain all instalments paid by the hirer in respect of the hire period up to the termination of the hiring, but not thereafter. In a contract of sale of goods by instalments, e.g., a credit-sale, if there is no forfeiture clause, the buyer is entitled to recover instalments paid in part-prepayment of the price, upon rescission of the contract by the seller in consequence of the buyer's default, subject to a cross-claim by the seller for damages for breach of contract. But this principle cannot apply to true hire-purchase agreements, where the instalments are paid as hire-rent for the hire of the goods, and not as a prepayment of the purchase price.

As regards any instalments of hire-rent in arrears at the termination of the hiring, at common law the owner will always be entitled to recover, because he has a valid claim to receive any payments of instalments due even while the contract of hire continues and without any termination. The arrears of instalments represent an accrued debt due to him from the hirer, and the right to receive payment of such a debt is a separate cause of action from the right to recover damages for breach of contract (see *Overstone Ltd.* v. *Shipway* [8]).

The right to receive arrears due is also a separate cause of action from the right to recover possession of the goods. Thus, the fact that the owner has brought an action, and recovered judgment, for the arrears of instalments does not preclude him from bringing a separate action for possession of the goods. This is unless *semble* the circumstances are such as to show that, by so doing, he has elected to continue the agreement and waived his right to terminate. Conversely, the fact that he has recovered possession of the goods does not deprive him of his right to sue for arrears of instalments (see *Brooks* v. *Beirnstein* [18]).

Goode's Hire-Purchase Law and Practice at page 149 sums up the remedies of an owner under a hire-purchase agreement as follows:—

> "Accordingly in practice upon the hirer committing a breach which entitles the owner to terminate the agreement, the owner upon terminating may retain all payments made by the hirer under the agreement and may in addition recover:—
>
> (a) possession of the goods, either by recaption or by action in tort for detinue. Alternatively he can recover damages in contract for breach of the obligation to re-deliver or in tort for detinue or conversion;

(b) all hire-rent due and unpaid at the date of termination of the agreement;

(c) the sum due under a minimum payment clause or a depreciation clause provided that such sum is a reasonable pre-estimate of liquidated damages and not a penalty.

Where there is no such clause, or the clause is unenforceable as imposing a penalty, the owner may sue for damages for loss of profit resulting from the termination. The measure of damages will normally be the unpaid balance of the hire-purchase price less:—

(i) the value (or if sold, the proceeds of sale) of any goods repossessed;

(ii) any fee payable for the exercise of the option to purchase (since the hirer was not obliged to exercise the option); and

(iii) a discount for the acceleration of payment — that is, a deduction to take account of the fact that the owner has become entitled immediately to a lump sum in damages instead of having to accept instalment payments as he would have done if the agreement had run its proper course."

Applying the principles of law which I have discussed, I do not see how I can avoid the conclusion that the plaintiffs' claim must succeed. To use the words of Lord Macnaghten in *Helby* v. *Matthews*,[10] "this was an agreement not forbidden by law, not unintelligible, and not, I think, unreasonable." In the event of the defendant being in arrears in instalments the plaintiffs were entitled to terminate the agreement, and in the event of the hiring being so terminated the defendant was to remain liable to the plaintiffs for arrears of rent up to the date of termination. Admittedly, the defendant was in arrears of five instalments. As I have already stated, the termination of the hiring by the plaintiffs was not invalid. I have found it as a fact that it was after 18th May, 1965 that the defendant ceased to be in possession of the payloader. The letter dated 10th June, 1965 by the plaintiffs to the defendant was ample notice of the fact that the hiring was being terminated or had been terminated. By this letter the plaintiffs gave the defendant an opportunity to repay the arrears of instalments and take back the payloader. Instead of availing himself of this opportunity, the defendant caused his solicitors to write back to the plaintiffs to say that he was prepared to pay all arrears only if they could return the machine to him in good and workable condition.

The fact that by selling the payloader for $18,940 the plaintiffs have recovered more than they are claiming from the defendant is beside the point. The payloader was their property all along, they retook possession of it lawfully and thereafter they were entitled to do what they liked with it. As they are not claiming damages for breach of the hire-purchase agreement, they are not liable to account for the amount which they realised by selling it. I appreciate that it may be considered hard and unjust on a hirer if the hire-purchase agreement is terminated after he has paid a major portion of the hire-purchase price, but there is nothing unlawful in the owner enforcing his rights under the contract if the hirer is in fact in breach of the agreement. The sort of situation which arises in such a case is something which only Parliament can remedy. So long as the rights of the parties rest in common law and are not modified by the legislature, cases of this nature will continue to give rise to righteous indignation and the courts will have no power to grant any relief. That is exactly the situation here.

I have rejected the rather novel proposition of law put forward on behalf of the defendant that he was not liable to pay the instalments for the period during which he was deprived of the use of the machine when it was undergoing repairs. The machine was repaired from time to time and returned to him. It was ready for him on 25th May, 1965 when it had been last repaired, but he failed to take delivery of it. The claim for $2,348.86 in respect of goods supplied is admitted. The defence that he is not liable to pay the amount claimed in respect of repairs because the bill for such repairs was delivered to him after the plaintiffs had retaken possession of the payloader, even though it is not denied that such repairs were in fact carried out before the date of repossession, is both puerile and fatuous. As regards the counterclaim, it must fail because there was no breach of agreement on the part of the plaintiffs. Accordingly, there will be judgment for the plaintiffs on the claim for $13,342.09 with interest thereon as prayed. The counterclaim is dismissed. The defendant must pay the plaintiffs' costs of the action.

Judgment for the plaintiffs.

Solicitors: *Shearn, Delamore & Co.; Skrine & Co.*

GAN CHWEE LEONG v. NEW INDIA ASSURANCE CO. LTD.

[A.C.J. (Ismail Khan J.) November 25, 1967]
[Malacca — Civil Appeal No. 17 of 1966]

Insurance — Motor insurance — Claim for damages — Insurers settling claim — Whether insured liable to reimburse.

The appellant was insured with the respondents against third party risks in respect of a motor van. On July 18, 1964 the van was involved in an accident with a third party. In breach of condition 4 of the insurance policy the appellant failed to give notice of the accident to the respondents who only came to know about the accident when they received a letter from the solicitors of the third party three months after the accident. On October 29, 1964 the respondents by letter informed the appellant of the breach of this condition and without prejudice to their rights under the policy submitted a claim form to the appellant. The appellant returned the form duly completed giving, *inter alia*, an account of the accident. On November 6, 1964 the respondents wrote to the appellant informing him that the solicitors for the third party were claiming a sum of $1,157.50 and stating that the claim was not payable by